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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 645

THE MACCABEES and EMILE A. HAAR,
Petitioners,

and

DAVID A. HERSH, ROBERT E. MORRIS, R. B. TWOGOOD, R. L. KESTER, L. F. AYER, C. ROBERT YOUNG, A. F. DEVINE and JOSEPH A. NAVARRE,
Defendants,

against

GEORGE SHELLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Maccabees and Emile A. Haar, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Clark, Waterman and Friendly, C. JJs.), dated December 5, 1960, dismissing for lack of jurisdiction the appeal of the petitioners from the order of the United States District Court for the Eastern District of New York (Rayfiel, D. J.), entered on the 9th day of June, 1960.

The District Court order appealed from denied petitioners' motion to disqualify and restrain respondent's attorneys in this action from acting as such (*6-8). The motion was made on the ground that their present representation of the respondent constitutes a violation of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, adopted by General Rule 5(c) of the District Court, by reason of their former representation of the petitioner, The Maccabees (up to a few months prior to commencing this and other litigations against The Maccabees), in matters substantially related to the present litigation.

Simultaneously the same three judge division of the Court of Appeals (Clark, Waterman and Friendly, C. JJs.), denied petitioner's cross motion for *in banc* consideration of respondent's motion to dismiss the appeal.

Citations to Opinions Below.

No opinion was rendered by the United States Court of Appeals in dismissing the petitioners' appeal. The opinion of the District Court (Rayfiel, D.J.) is reported in 184 F. Supp. 797 (1960) and is set forth in full in the defendants-appellants' appendix to the Court of Appeals at pages 9 through 15.

Jurisdiction.

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered on December 5, 1960 and the jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

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* Numbered references unless otherwise noted are to defendants-appellants' appendix to the Court of Appeals, ten copies of which have been filed with the Clerk of the Supreme Court to accompany this petition. In addition, Exhibits 10, 11, 12 also have been filed with the Clerk of this Court.

Questions Presented.

1. Did the United States Court of Appeals for the Second Circuit, in dismissing for lack of jurisdiction petitioners' appeal from the order of the District Court denying petitioners' motion to disqualify and restrain respondent's attorneys, depart from the principles laid down by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) providing for immediate appeal from important orders having collateral finality?

2. Did the Court of Appeals, in dismissing for lack of jurisdiction petitioners' appeal, act contrary to express statutory authority allowing appeals from interlocutory orders refusing injunctions, as set forth in Section 1292(a)(1) of Title 28, U. S. C.?

3. Does the intra-circuit conflict among the judges of the United States Court of Appeals for the Second Circuit, as to the appealability of an order denying a motion to disqualify and restrain former attorneys from present adverse employment, call for an exercise of this court's power of supervision in a recurrent question of importance to the public and the administration of justice?

4. Was the order of the District Court denying petitioners' motion erroneous in light of the fact that the undisputed documentary evidence established beyond doubt that respondent's attorneys had recently represented petitioner, The Maccabees, in matters which are substantially related to the matters involved in this litigation?

Statute, Court Rule and Canons of Ethics Involved.

The statutory provision involved upon which the petitioners' appeal to the United States Court of Appeals was based in part is Section 1292(a)(1) of Title 28, United States Code, which provides:

> "Interlocutory decisions.
>
> The courts of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court."

The rule of court involved is the first paragraph of General Rule 5(c) of the Rules of the United States District Court for the Eastern District of New York which provides as follows:

> "(c) Professional misconduct shall include fraud, deceit, malpractice or conduct prejudicial to the administration of justice, or failure to abide by the provisions of the Canons of Ethics of the American Bar Association or of the New York State Bar Association."

The Canons of Professional Ethics of the American Bar Association involved are Canons 6 and 37.

Canon 6 provides as follows:

> "*Adverse influences and Conflicting interests.*
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given

after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 37 provides as follows:

"*Confidences of Client.*

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences either for the private advantage of the lawyer or his employees or to the disadvantage of the client without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

Statement.

The jurisdiction of the United States Court of Appeals for the Second Circuit was invoked (1) on the ground that the order appealed from was one having collateral finality within the class of orders described in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1940), as interpreted in *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 555 (2d Cir. 1957) *rehearing denied* 241 F. 2d 937

(1957) *cert. denied* 355 U. S. 824 (1957), and (2) on the ground that the order was appealable as an interlocutory order refusing an injunction within the meaning of 28 U. S. C., Section 1292(a)(1).

The jurisdiction of the United States District Court for the Eastern District of New York in the action was based upon diversity of citizenship, 28 U. S. C., Section 1332(a).

Facts.

The petitioners' motion in the District Court, predicated as stated upon Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association adopted as court rule by General Rule 5(c) of the District Court, was made on the ground that matters in which respondent's present attorneys in this action represented The Maccabees as recently as April 1959, five months before the commencement of the present action in September 1959 (134, 172-173) and with respect to which the petitioner, The Maccabees, reposed complete confidence in them and gave them unlimited access to corporate information, were and are substantially related to the subject matter of the present action.

The former representation.

The corporate petitioner, The Maccabees, is a Michigan fraternal benefit insurance society. It is the largest domestic life insurer incorporated in Michigan and does business in 45 states (19).

The matters in which respondent's present attorneys formerly represented The Maccabees commencing in July, 1957 concerned criticisms of The Maccabees expressed in confidential examinations of its affairs made by the Michigan Insurance Department commencing early in 1957 and by the New York Insurance Department commencing

in July, 1958 (66-68, 74-77, 81-83). The matters criticized by the Michigan Insurance Department included conflicts of interest on the part of the officers and directors, including the respondent (75-76). Respondent was a Director, President, head of the New York State unit of The Maccabees, and Chairman of the Board of Directors (19, 98).

In September, 1958, respondent's present attorneys were retained by The Maccabees to assist in the transformation of The Maccabees to a mutual life insurance company, a course of action which had been voted as a result of the Insurance Department criticisms (19, 80). In this connection, the said attorneys were entrusted with a copy of the voluminous highly confidential Insurance Department report containing criticisms of The Maccabees and going into minute detail on every phase of its activities (19, 70-71). Also, they were given other extensive statistical data and confidential reports regarding The Maccabees (78-79, 93-95). They were authorized to confer with New York and Michigan Insurance Department officials (54). Management conferred with them on the most confidential affairs of the Society (21, 54, 74-77).

The present action.

In the present action for $11,198,000 commenced by the respondent against The Maccabees simultaneously with six other actions in September 1959 (127-128), the respondent, among other things, seeks damages for conspiracy to breach and induce the breach by the corporate petitioner of two alleged contracts whereby The Maccabees (a) at the election of the respondent, would buy from him or his estate certain renewal commissions for the sum of $1,198,000, and (b) at his death or retirement would buy the good will, furniture and fixtures of the New York Metropolitan Agency of The Maccabees operated by respondent for the sum of $1,000,000 (26-35).

The pleadings and affidavits of the petitioners not only place in issue the existence of the alleged agreements in that they had never actually been executed by the parties (38-43), but also raise what is the dominant issue in this action, namely that the aforesaid proposed agreements between the corporate petitioner and respondent, its chief executive officer, were a violation of his fiduciary duty as such and were grossly burdensome, unfair and unjustifiable and were the product of the dominance of the respondent exerted in violation of his various positions of trust (21, 45-48, 57, 61-64). This was the very type of conflict of interest which had been severely criticized during the examinations of the Michigan and New York Insurance Departments, as noted above.

Moreover, this was the very type of criticism with respect to which the professional services of respondent's present attorneys had formerly been enlisted by The Maccabees both before and after the decision to transform to a mutual life insurance company. The scope of their employment in dealing with the transformation encompassed solution of the conflict of interest problem, among others, disclosed by the Insurance Department examinations (58). Transformation was in jeopardy if the questioned practices and procedures continued (69-70).

For these services, which the respondent himself described as "legal work performed for The Maccabees" (81-83) and for which the said attorneys billed The Maccabees either directly (89) or through the Metropolitan Agency operated by the respondent (81-82), The Maccabees paid these attorneys $11,880.80 (84-85, 89). There is therefore hardly any room for the suggestion attempted by respondent's attorneys that any part of these services were "personal" to the respondent.

Therefore, this action which these attorneys have commenced against their former corporate client does involve

matters substantially related to their former representation which encompassed within its scope every aspect, even the most confidential, of the corporate petitioner's operations. The action necessarily will involve close scrutiny of the relationship of the respondent to the corporate petitioner and his abuse of authority over a long period of time in his various positions of trust. It will require examinations of the various contracts under which he had obtained successively larger benefits for himself. In addition, it will inevitably lead to review of the entire internal affairs of The Maccabees, including relationships of all officers and directors with it.

Respondent's present attorneys themselves provide the best evidence of the substantial relationship between this action and the matters of their former representation for in the deposition they took of Joseph A. Navarre (who, after resigning as Commissioner of Insurance of the State of Michigan, which he was during 1957 and 1958, became associated in January, 1959 with The Maccabees as an insurance consultant), they proceeded to make hostile use of confidences entrusted to them in their former capacity (25, 57).

The District Court Opinion.

The District Court opinion notes that the respondent's present attorneys and their Detroit associate represented The Maccabees on the New York Insurance Department investigation as well as in the transformation of The Maccabees from a fraternal benefit insurance society to a mutual insurance company, "and, accordingly, that [the law firm] had access to information connected therewith" (14) (184 F. Supp. at 800). It also noted that they received a copy of the interim report of the Michigan Insurance Department and that its contents was confidental (13-14). (184 F. Supp. at 800). Yet the Court denied the motion on the clearly erroneous, untenable, wholly unsupported and

somewhat contradictory conclusion that the moving affidavits failed to show "*any* confidential information • • • from 'The Maccabees' • • • let alone confidences which are *substantially related to the issues involved in the instant action*" (Emphasis by the Court) (*supra*). The Court also made an erroneous point of the fact that the Michigan report "was actually given to Manning, Hollinger & Shea by [the respondent] and not by 'The Maccabees'" (*supra*) ignoring the fact that the respondent at the time was Chairman of the Board of The Maccabees and had access to and could deliver the confidential Michigan report only in his capacity as such.

A request was made by petitioners to and refused by the District Court to include in the order the statement regarding appeal provided for by Title 28, U. S. C., Section 1292 (b). This was, of course, not an admission by petitioners against their present position that they were entitled to appeal as a matter of right. It was but a justifiable precaution in view of uncertainty on the question indicated by the differing and divided past decisions of the United States Court of Appeals hereafter referred to.

Reasons for Granting the Writ.

This petition presents questions of importance to the public, the members of the Bar and the administration of justice which have not been and should be settled by this Court.

1. The United States Court of Appeals for the Second Circuit, in dismissing petitioners' appeal for lack of jurisdiction, departed from the principles laid down by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949) providing for immediate appeal from important orders having collateral finality.

The Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), in holding appealable an

order denying a motion to require that a plaintiff give security, as provided in a state statute, recognized that there are a small class of orders which:

> "finally determines claims of rights separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (at 546).

In *Swift & Co.* v. *Compania Colombiana*, 339 U. S. 684 (1949), a unanimous court, following this principle, sustained an appeal from an order vacating the attachment of a vessel and cautioned that:

> "• • • • The provision for appeals only from final decisions in 28 USCA, §1291, FCA, Title 28, §1291, should not be construed so as to deny effective review of a claim fairly separable from the context of a larger litigious process" (at p. 689).

See the same view expressed in 6 *Moore's Federal Practice*, page 275, 1953. See also *Collins* v. *Miller*, 198 F. 2d 948 (D. C. Cir. 1952) holding appealable an order denying a motion to remove an administrator.

The motion to restrain respondent's attorneys was an application collateral to the issues of the litigation in chief and for practical purposes determined with finality an important question.

The adjudication of the right of respondent's attorneys to remain as his attorneys did not make any step toward the final disposition of the merits of the case and presented facts wholly independent of the issues involved in the main litigation. However, if the right of the petitioners to appeal is deferred until the conclusion of the action, and confidences have been breached throughout, and improper

advantage taken, the damage will have been done and can hardly be repaired by an appellate order of disqualification at that stage. See Note, 38 *Tex. L.R.* 792 (1960).

Unless immediate review of the District Court order be entertained, rights irretrievably will be lost though the case on its merits shall not have been adjudged. The following language in *Cohen* (337 U. S. at p. 546) is unmistakably applicable to the instant case:

> "The purpose [in limiting appeals to final decisions] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or be affected by, decision of the merits of this case."

In 1955 the Second Circuit in *Lasky* v. *Warner Bros.*, 224 F. 2d 824 entertained an appeal from an order denying disqualification of attorneys. In 1957 the Second Circuit, through Swan and L. Hand, C.JJs., relied on the *Cohen* case in sustaining an appeal from a denial of a motion to disqualify and restrain attorneys. See *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 555 (2d Cir. 1957) *rehearing den.* 241 F. 2d 937, *cert. denied* 355 U. S. 824.

In 1959, only a few months after *Harmar* was cited with approval, [see *MacAlister* v. *Guterma*, 263 F. 2d 65, 67 (2d Cir.)] a divided Circuit overturned the previous practices of the Court in *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959), *cert. denied*, 359 U. S. 1002 (1959).

It would seem from the reasoning in *Fleischer* that if the motion below in the present case had been granted and the attorneys had been disqualified and restrained, the order would be appealable (*supra*, at 517). It is submitted that there is no valid distinction between appealability of orders granting and denying attorney disqualification. There is a final and irreparable effect on the rights of either the attorney or the moving former client if the motion to restrain is granted or denied. The right of the client to be protected from ethically proscribed adverse representation is no less important than the rights and reputation of a disqualified attorney. Indeed, the Court of Appeals for the Second Circuit in *Consolidated Theatres Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F. 2d 920, 926 (1954) has pointed out that the Canons as incorporated into the rules of the Court:

> "• • • must be viewed not as a Bill of Rights for the Bar but, rather, a codification of the more important limitations of legal practice broadly deemed necessary for the protection of clients."

The rationale of the decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1940), warranted and does warrant immediate review of the questions presented on petitioners' motion denied below. Thus, Judge Moore, dissenting in *Fleischer* v. *Phillips*, 264 F. 2d 515, 518 (2d Cir. 1959) urged:

> "If such representation may be a violation of the canons of ethics so as to taint the entire proceeding this possibility should be tested at the threshold. The disqualification question is wholly collateral to the issues in the litigation and should not be mingled with matters which will be resolved only in a final judgment on the merits. Orderly and expeditious trial procedure would scarcely be achieved were a

lengthy trial to be held which might be reversed on appeal were it determined that defendant's attorneys should have been disqualified. The time spent in seeking an adjudication on the merits would thus have been wasted because of an error unrelated to the issues of the case."

2. The Court of Appeals, in dismissing petitioners' appeal for lack of jurisdiction, acted contrary to express statutory authority allowing appeals from interlocutory orders refusing injunctions, as set forth in Section 1292(a)(1), Title 28, U. S. C.

The motion in the District Court was for an order "disqualifying and restraining the firm of Manning, Hollinger & Shea * * * from acting as attorneys for the plaintiff in this action or directly or indirectly acting or aiding in the prosecution thereof, and from divulging to any person or persons any facts or information relevant to this action." (6, 16)

The view expressed in *Fleischer* v. *Phillips*, 264 F. 2d 515, 516 (2d Cir. 1959), that the injunctive relief demanded with a motion to disqualify former attorneys is merely incidental, is clearly incorrect. Such an order is one refusing an injunction and is appealable by statute (Section 1292(a)(1), Title 28, U. S. C.).

In seeking to restrain their former attorneys, petitioners sought to prevent the hostile disclosure and use of confidences to which they had unlimited access in employment which ceased only five months before their commencement of this action. The damage from such hostile disclosure and use, or potential disclosure and use, is clearly of such a character that it could not adequately be compensated by damages at law or by disciplinary action. The continuing risk of abuse of confidences is such as to call for eradication by preventive relief.

In any injunction procedure factual establishment and determination of the wrong to be enjoined must always come first. A decree of disqualification alone would have been totally ineffective without accompanying injunctive relief unless a disqualification order is to be deemed injunctive in and of itself. The remedy demanded was analogous to that involved in proceedings to prevent a former employee entrusted with confidences from utilizing or disclosing the same in a competing employment.

3. The intra-circuit conflict among the judges of the United States Court of Appeals for the Second Circuit, as to the appealability of an order denying a motion to disqualify and restrain former attorneys from present adverse employment, calls for an exercise of this Court's power of supervision in a recurrent question of appellate jurisdiction of importance to the public and the administration of justice which has not been and should be settled by this Court.

It is respectfully submitted that in the exercise of this Court's power of supervision, a writ of certiorari should issue because of the intra-circuit conflict on a recurrent question of appellate jurisdiction which is of great importance to the public, members of the Bar, and to the administration of justice. See e. g. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1949); *Maggio* v. *Zeitz*, 333 U. S. 56 (1947); *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180 (1939).

Within the past three years this Court has declined to review judgments of the United States Court of Appeals for the Second Circuit both holding appealable orders denying motions to disqualify and restrain former attorneys [*Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 555 (2d Cir. 1957); *cert. denied*, 355 U. S. 824 (1957)] and then holding them not appealable [*Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959), *cert. denied*, 359 U. S. 1002 (1959)].

A jurisdictional question of this importance and having such direct bearing upon public confidence in the Bar and the administration of justice, should not be left unsettled.

Prior to the divided decisions in *Fleischer* v. *Phillips*, *supra* and *Marco* v. *Dulles*, 268 F. 2d 192 (2d Cir. 1959), it had been the practice of the Second Circuit as recently as 1957 to treat as appealable an order denying disqualification of an attorney. See *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, *supra* and *Lasky* v. *Warner Bros.*, 224 F. 2d 824 (2d Cir. 1955). As late as February 13, 1959 the Second Circuit had unanimously cited the *Harmar* decision as an effective authority. See *MacAlister* v. *Guterma*, 263 F. 2d 65, 67.

Fleischer and *Marco*, in reversing the existing line of authority, were marked by the vigorous dissents of Moore, C. J. who expressed the need for uniformity of decision on this important and recurrent problem. See *Marco* v. *Dulles*, 268 F 2d 192, 193 (2d Cir. 1959). Judge Moore in the latter case (at p. 194) urged that the failure of the Court to treat an order denying disqualification as appealable would

> "• • • only accomplish all that both the Supreme Court and the recent legislation hoped to avoid, namely, repetition, duplication, delay and expense."

It is submitted that where learned judges of the Second Circuit have lately taken diametrically opposed positions on this subject so closely related to the trust and confidence which the public should continue to have in attorneys and in the administration of justice, the supervision of this court is called for.

On such an issue as is here involved, the client's right to seek review of a clearly erroneous decision of a District Court dealing with a matter essential to our system of

justice should not be dependent upon chance assignments of learned circuit judges to a particular appeal.

The need for uniformity, it is urged, justifies review by this Court.

4. The undisputed documentary evidence established beyond doubt that the matters in which respondent's attorneys recently represented petitioner, The Maccabees, are substantially related to the matters involved in the present litigation.

(a) Petitioners were not required to prove disclosure of specific confidences, but had only to demonstrate that the matters of the prior representation were substantially related to the matters involved in the present controversy.

The evidence required on a motion to disqualify was stated by Judge Weinfeld in *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953) at page 268:

> "I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation."

The rule of evidence enunciated by Judge Weinfeld has been cited with approval and interpreted as creating an "irrebuttable inference" that confidences material to the pending case were reposed in the former attorney if the

subject matter of the former representation is substantially related to the subject matter of the current litigation. See e.g. *Consolidated Theatres, Inc.* v. *Warner Bros. C. M. Corp.*, 216 F. 2d 920, 924 (2d Cir. 1954); *Marco* v. *Dulles*, 169 F. Supp. 622 (S. D. N. Y. 1959).

The opinion of the District Court, while expressing agreement with the rules cited in the above cases, clearly takes a position inconsistent therewith. The District Court stated (emphasis in text):

> "Nowhere in any of the affidavits submitted in support of the application for the order of disqualification is there reference to *any* confidential information allegedly obtained from 'The Maccabees' by Manning, Hollinger & Shea, or its associates or employees, during their representation of it let alone confidences *which are substantially related to the issues involved in the instant action*" (184 F. Supp. at p. 800; Def. App. Appendix to the Court of Appeals, pp. 13-14).

In claiming that the petitioners failed to refer to specific confidential information obtained by Manning, Hollinger & Shea, the Court below in effect required the production of the type of *direct* evidence of confidential disclosures which the courts have consistently held is not necessary for a former client movant to produce.

(b) Petitioners more than met their burden by demonstrating that respondent's present attorneys were in fact the recipients of highly confidential matter about The Maccabees substantially related to the present litigation.

Evidence presented to the District Court showed that respondent's present attorneys, while representing The Maccabees, not only had access to confidential matter of

The Maccabees, but that they were in fact recipients of highly confidential information and material about The Maccabees relevant to this case (71, 78-79, 93-95).

The Court found that the attorneys represented The Maccabees on the New York Insurance Department examination as well as the proposed "transformation" of The Maccabees from a fraternal benefit society to a mutual life insurance company (184 F. Supp. at p. 800; Def. App. Appendix, pp. 13-14). It also found that they received a copy of the confidential interim examination report of the Michigan Insurance Department (184 F. Supp. at p. 799; Def. App. Appendix, p. 12). The matters involved in these representations are substantially related to the matters of the pending litigation.

The pleadings and affidavits on the motion below, show that the question of respondent's domination, conflict of interest and the fairness of the commission contracts which formed the basis for a valuation of the proposed renewal commission agreement of January 23, 1959, and which were the subject of criticism by the regulatory bodies of New York and Michigan, will be the crux of the controversy in the pending case (21, 38-43, 45-48, 57, 61-64).

The proof on the motion below showed that these areas of criticism, which in fact jeopardized the license of petitioner, The Maccabees, to do business in the State of New York (Exh. 11, p. 141), would have to be eliminated if the proposed transformation, the objective to be achieved in the employment of these attorneys, was to be accomplished.

In addition to the confidential Insurance Department reports (each of which constitutes a comprehensive audit of the company and its practices) they were furnished with voluminous private accounting reports and statistical material (93-95).

Petitioners could not begin to enumerate in detail all the "confidential information" obtained by respondent's attorneys. In *Marco* v. *Dulles*, 169 F. Supp. 622, 629 (S. D. N. Y. 1959) the Court said:

> "The words 'confidence' and 'confidences' • • • include • • • intangibles arising from the very nature of the lawyer-client relationship which result from mutual discussion of the problems facing the client, consideration of the problems by counsel and the advice given thereon, the rationale of the solutions proposed and the legal techniques by which such solutions are arrived at."

The District Court conclusion that there is no substantial relation between the matters involved in the two employments is completely contradicted by the record and without any foundation in the evidence whatsoever. In fact, respondent's present attorneys contradict it by the use which they have made in the deposition of Mr. Navarre in this action of material entrusted to them in their former employment by the corporate petitioner (25, 57).

(c) Availability from other sources of confidences reposed by petitioner, The Maccabees, would be immaterial.

In its opinion, the District Court stated (184 F. Supp. 797, 880; Def. App. Appendix, pp. 13-14):

> "The interim report of the Michigan Insurance Department, while its contents may be confidential under Michigan law, (1) is not a confidence obtained from 'The Maccabees' by Manning, Hollinger & Shea, • • • It may be added that said interim report was actually given to Manning, Hollinger & Shea by the plaintiff, and not by 'The Maccabees'."

It is not necessary to show that the former client is the exclusive source from which the attorneys could have

derived the information which he gained or had access to during the course of his former representation. See Canon 37 and also *Marco* v. *Dulles*, 169 F. Supp. 622, 630 (S. D. N. Y. 1959); *Fleischer* v. *A. A. P. Inc.*, 163 F. Supp. 548, 551 (S. D. N. Y. 1959).

Moreover, this phase of the opinion ignores the fact that respondent was Chairman of the Board of The Maccabees and had access to and could deliver the confidential Michigan report only in his capacity as such.

Conclusion.

Because for the foregoing reasons this case presents questions of importance to the public, the members of the Bar and the administration of justice which have not been and should be settled by this Court, petitioners respectfully request this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOHN P. WALSH,
Counsel for Petitioners.

JAY GOLDBERG,
Of Counsel.

January 10, 1961

FILE COPY

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 645.

THE MACCABEES and EMILE A. HAAR,

Petitioners,

against

DAVID A. HERSH, ROBERT E. MORRIS, R. B. TWO GOOD, R. E. KESTER, L. E. AYER, C. ROBERT YOUNG, A. F. DEVINE and JOSEPH A. NAVARRE,

Defendants,

against

GEORGE SHELLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION.

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OCTOBER TERM, 1960.

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Defendants,

against

GEORGE SHELLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

No opinions were rendered by the United States Court of Appeals (Clark, Waterman and Friendly, C. JJs) in dismissing the petitioners' appeal and in denying petitioners' motion for an *en banc* hearing. The opinion of the District Court (Rayfiel, D. J.) is reported at 184 F. Supp. 797 (E. D. N. Y. 1960) and is set forth in full in the defendants-appellants' appendix in the Court of Appeals at pages 9-15.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Is there an intra-circuit conflict in the United States Court of Appeals for the Second Circuit with respect to the appealability of orders denying the disqualification of attorneys?

2. Did the United States Court of Appeals for the Second Circuit, in dismissing for lack of jurisdiction petitioners' appeal from the order of the District Court denying petitioners' motion to disqualify and restrain respondent's attorneys, violate the principles laid down by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) or did it merely follow the settled federal principle against piecemeal appeals?

3. Did the Court of Appeals, in dismissing petitioners' appeal for lack of jurisdiction, violate 28 U. S. C. §1292 (a)(1) which allows appeals from interlocutory orders refusing injunctions?

4. Was the order of the District Court denying petitioners' motion erroneous in light of the fact that the documentary evidence, as well as numerous affidavits established beyond doubt that the matters in which respondent's attorneys had formerly represented petitioner, The Maccabees, were not related to the matters involved in this litigation?

Statutes, Court Rule and Canons of Ethics Involved.

Section 1291, Title 28, United States Code, which limits the appellate jurisidiction of courts of appeals to final decisions, except as otherwise provided in 28 U. S. C. §1292, provides as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1292(a)(1), Title 28, United States Code, which permits appeals from interlocutory orders granting or refusing injunctions, is set forth adequately at page 4 of the Petition.

Section 1292(b), Title 28, United States Code, which provides for discretionary interlocutory appeals involving important unresolved questions of law, provides as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

General Rule 5(c) of the Rules of the United States District Court for the Eastern District of New York and Canons 6 and 37 of the Canons of Professional Ethics are set forth adequately at pages 4 and 5 of the Petition.

Statement.

The nature of this action.

Respondent charges the corporate petitioner The Maccabees (a large fraternal insurance society) with the breach of two contracts in which the corporate petitioner had agreed to purchase respondent's New York insurance business (*26-30). Respondent also charges the corporate petitioner with the breach of certain field contracts pursuant to which respondent had built up and operated his insurance business over a period of more than 20 years, and with the unlawful confiscation of that business (35-37). Respondent further claims that certain of the officers and directors of The Maccabees conspired with each other and with an outside consultant to induce the breach of the aforesaid contracts, to oust respondent by unlawful means from his elective posts in The Maccabees, and to seize his valuable insurance business for their own benefit (28-37).

The facts of this complex controversy are set out in detail in the affidavits of George Shelley (95-120) and Bruce A. Hecker (121-154). Contrary to the assertion on page 8 of the Petition, the agreements for the purchase of respondent's business by The Maccabees were the result of extensive arm's-length negotiations and actuarial studies (101). The contracts were prepared by The Mac-

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* Numbered references unless otherwise noted are to defendants-appellants' appendix to their brief in the Court of Appeals, ten copies of which were filed by petitioners with the Clerk of the Supreme Court to accompany their Petition.

cabees' own general counsel (114) and were accepted in writing by both sides (101).

The former representation of The Maccabees by respondent's present attorneys.

The New York law firm of Manning, Hollinger & Shea and Peter J. Monaghan, Esq., a Detroit attorney, have represented respondent personally in numerous matters since early in 1957 (110-115, 129-134). In September 1958, Manning, Hollinger & Shea and Mr. Monaghan were retained by The Maccabees for the first and only time to assist the corporation's general counsel in connection with certain technical problems relating to the transformation of The Maccabees from a fraternal insurance organization to a mutual insurance company (112-113, 131-132). Contrary to petitioners' present assertions, this transformation was not made necessary because of any alleged conflicts of interest on the part of respondent and other directors. It was based solely on a finding by the Michigan Insurance Department that The Maccabees was no longer operating as a true fraternal society (112, 131, 136). This is borne out by the fact that respondent and the other directors were elected only after it had been decided to transform The Maccabees to a mutual life insurance company (96-97).

It was agreed that The Maccabees' retainer of Manning, Hollinger & Shea and Mr. Monaghan would be limited to specific transformation problems and that they would continue to act as respondent's personal attorneys (113, 132). Accordingly, these attorneys represented respondent in the negotiations for the sale of his business, which is the chief subject matter of the case at bar, while The Maccabees was represented by its own general counsel (114, 132-133).

In March 1959, when respondent had a falling-out with his fellow-directors, Manning, Hollinger & Shea and Mr.

Monaghan resigned as special counsel on the transformation and Manning, Hollinger & Shea has continued to represent respondent at all times (115, 134). Petitioners do not contend that respondent's present Detroit attorney, Mr. Joseph W. Louisell, whose disqualification was also sought below, was ever employed by The Maccabees.

The District Court Opinion.

After listening to many hours of argument, studying numerous affidavits and inspecting all relevant office files (11) of Manning, Hollinger & Shea (which are not included in the record here) the District Court found that there was absolutely no basis for petitioners' charge that respondent's attorneys had violated the Canons of Ethics and refused to disqualify respondent's attorneys. The District Court accepted the legal tests proposed by petitioners themselves and found (a) that there was no evidence that respondent's attorneys had actually received any confidential information from The Maccabees (184 F. Supp. at 800), and (b) that the limited work that respondent's attorneys had performed for The Maccabees was on "matters totally unrelated to the instant case" (184 F. Supp. at 801), so that there could be no automatic presumption that respondent's attorneys had received any confidences from the corporate petitioner. Since the decision obviously did not involve "a controlling question of law as to which there is a substantial ground for difference of opinion", the District Court properly denied petitioners' request (8) to certify its order for an interlocutory appeal under 28 U. S. C. §1292(b).

On June 17, 1960 the Circuit Court of Wayne County, Michigan denied without a written opinion a parallel motion brought by petitioners on the same grounds to disqualify respondent's attorneys from representing respondent in the Michigan state court.

Reasons for Denying the Writ.

Contrary to petitioners' assertion, this Petition does not involve an intra-circuit conflict, nor does it present any important questions of federal or state law which require the consideration of this Court.

1. There is no intra-circuit conflict in the Second Circuit with respect to the appealability of an order denying a motion to disqualify former attorneys from alleged adverse employment.

In *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 555 (2d Cir. 1957) *rehearing denied* 241 F. 2d 937 (1957) *cert. denied* 355 U. S. 824 (1957), a divided court held that orders denying disqualification of attorneys were appealable. Two years later, in *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959) *cert. denied*, 359 U. S. 1002 (1959), the court had occasion to reconsider this question. It concluded that its decision in *Harmar* had been unsound, overruled *Harmar*, and held that orders denying disqualification of attorneys are not appealable either under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) or on the theory that they are really orders refusing injunctions. There was a dissent by Judge Moore.

In *Marco* v. *Dulles*, 268 F. 2d 192 (2d Cir. 1959), the court again rejected *Harmar* and adhered to its decision in *Fleischer* v. *Phillips* that orders denying disqualification are not appealable. It should be noted that the majority opinion in *Marco* v. *Dulles* was written by Judge Swan, who had also been the author of the majority opinion in the overruled *Harmar* case and who evidently now agreed that *Harmar* had been wrong. Judge Hincks concurred with Judge Swan and there was another dissenting opinion by Judge Moore. Then came the case at bar, in which Judges Clark, Waterman and Friendly unanimously fol-

lowed *Fleischer* v. *Phillips* and *Marco* v. *Dulles* and also denied petitioners' application for an *en banc* hearing to resolve the alleged "intra-circuit conflict."

Thus, the law in the Second Circuit is now absolutely clear and certain. Orders denying disqualification are not appealable. Circuit Judges Clark, Swan, Hincks, Waterman and Friendly have so held in the three most recent cases. The only active judge in the Second Circuit who has expressed disagreement with this position is Judge Moore. It is submitted that merely because one judge disagrees with his brethren, and merely because the Court of Appeals saw fit to overrule an erroneous decision (and has followed its new ruling ever since, with the assent of the very judge who wrote the opinion in the overruled case), affords no pretext for arguing that there is an intra-circuit conflict which can only be resolved by this Court.

2. The United States Court of Appeals for the Second Circuit, in dismissing petitioners' appeal for lack of jurisdiction, did not violate the principles of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) but merely followed the settled federal principle against piecemeal appeals.

The question of whether orders relating to the disqualification of attorneys are appealable or not was discussed for the first time in the majority and dissenting opinions in *Harmar Drive-In Theatre* v. *Warner Bros. Pictures*, 239 F. 2d 555 (2d Cir. 1957) *rehearing den.* 241 F. 2d 937, *cert. denied* 355 U. S. 824, which involved an appeal from an order denying the disqualification of attorneys. The majority noted at page 556 that the Second Circuit had previously assumed jurisdiction of three appeals from orders granting disqualification and one appeal from an order denying disqualification without discussion, and held

that all these orders appeared to involve elements of collateral finality rendering them appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

There was a vigorous dissenting opinion by Chief Judge Clark, who insisted that while orders granting disqualification should be appealable under *Cohen*, orders denying disqualification did not have the requisite elements of collateral finality and did not fall within the ambit of the *Cohen* rule. 239 F. 2d at 557. Judge Clark explained that in the one prior case in which the court had taken jurisdiction of an appeal from an order denying disqualification, *Austin Theatre, Inc.* v. *Warner Bros. Pictures*, 224 F. 2d 824 (2d Cir. 1955) (which petitioners have cited as an authority on pages 12 and 16 of the Petition *sub nom. Lasky* v. *Warner Bros.*), counsel had failed to raise the issue of appealability and he, as author of the opinion, had overlooked it, but that he could see no reason now to "crystallize" his own error. (239 F. 2d at 558-559).

In *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959) *cert. denied*, 359 U. S. 1002 (1959) the court reconsidered this question. Chief Judge Clark, speaking for the majority this time, overruled *Harmar*, which he criticized for its assumption that there is no distinction between the two types of orders. In holding that an order denying disqualification is not appealable, Judge Clark stated:

> "An order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney; but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Here, as with a motion to dismiss an action or to grant summary judgment, while the affirmative grant of the requested relief is final and appealable, a mere refusal to act is necessarily less conclusive and ought

not to be reviewed by this court." (264 F. 2d at 517)

The majority opinion restated the strong position of the Second Circuit against expanding the practice of interlocutory appeals, saying:

> "In this circuit in the past, powerful voices have been heard in support of interlocutory appeals and the continuing surveillance of trial court judges implicit therein. But research of a committee of the Judicial Conference of the United States, headed by the late great Judge Parker, disclosed that a majority of the federal judges were opposed to such a change and felt that the function of appeal was review, rather than trial supervision; and so the Conference limited its recommendations of new appellate jurisdiction to narrowly confined areas where both reviewed and reviewing judges felt that ultimate adjudication would be materially advanced. 28 U. S. C. §1292(b), effective Sept. 2, 1958. In the light of this experience and this enactment, the desirability of maintaining the settled federal principle against piecemeal appeals seems manifest. This is the position of a majority of the present active circuit judges shown in various rulings usually on motions which have not seemed to call for extensive opinion writing. (Citing numerous cases in footnote.) Hence upon principle and upon these more recent authorities we are constrained to hold the present orders not final for the purpose of appeal." (264 F. 2d at 517)

Chief Judge Clark also distinguished the case of *Collins v. Miller*, 198 F. 2d 948 (D. C. Cir. 1952), cited on page 11 of the Petition, saying that

> "under the unusual probate administration of the District of Columbia an action to remove an administrator must necessarily be instituted in the federal

> court and refusal of the remedy decisively terminates the proceeding." (264 F. 2d at 517, n. 1)

In a later decision, *Marco* v. *Dulles*, 268 F. 2d 192 (2d Cir. 1959), the court expressly followed *Fleischer* v. *Phillips* and again rejected *Harmar*, saying:

> "an order denying a motion to disqualify attorneys is interlocutory and not appealable without compliance with 28 U. S. C. A. §1292(b)." (268 F. 2d at 193)

As previously noted, the majority opinion in *Marco* v. *Dulles* was written by Judge Swan, who had also been the author of the majority opinion in the overruled *Harmar* case.

In dismissing the appeal in the case at bar, the Court of Appeals simply followed its prior decisions in *Fleischer* v. *Phillips* and *Marco* v. *Dulles*. Petitioners contend, however, that unless they are granted an immediate review of the order denying the disqualification of respondent's attorneys they will sustain irretrievable injury, and they seek to analogize their situation to that which existed in *Cohen* v. *Beneficial Industrial Loa. Corp.* But in the *Cohen* case it would have been useless for defendants to establish after a final judgment had been rendered against them that plaintiff had failed to post security for costs. The question would have become moot. Similarly, when an attorney is disqualified, his client must retain new counsel to continue to prosecute the action to final judgment, so that the question of whether the original disqualification was proper or not might well become moot and could never be raised on appeal. On the other hand, in a case where the District Court refuses to disqualify counsel, as in the case at bar, the other party can still challenge the correctness of this interlocutory ruling if a final judgment is rendered against

it,* and if the Court of Appeals finds that the District Court was in error it can still disqualify the attorneys and, if necessary, reverse the judgment and order a new trial. See, *e. g., United States* v. *Bishop*, 90 F. 2d 65 (6th Cir. 1937).

Judge Moore argues in his dissenting opinion in *Fleischer* v. *Phillips* that such a procedure would be terribly wasteful. But is it any more wasteful than any situation where an interlocutory order is reversed after final judgment thereby requiring a re-trial of the entire case? It is submitted that this is simply the occasional penalty that must be paid for not cluttering up the federal courts with interlocutory appeals, and delaying all litigation, as is the practice in some of our state courts. See the views of this Court in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176 (1955). And it must again be emphasized that Congress has recently provided an escape valve from the rigidity of 28 U. S. C. §1291, the final decision rule, by enacting 28 U. S. C. §1292(b). In the instant case, however, the District Court properly refused to certify its order for a discretionary interlocutory appeal under this new statute (8) because the order did not involve the requisite "controlling question of law as to which there is a substantial ground for difference of opinion" and petitioners merely wished to challenge the District Court's findings of fact.

Petitioners also argue that unless an order denying disqualification can be appealed forthwith, there is the continuing danger of disclosure of the former client's confidences. It should be noted that this particular problem did not seem to trouble petitioners in the case at bar. Although they filed their notice of appeal to the Court of Appeals on June 29, 1960 (3) they kept asking respondent's attorneys for extensions

* In this connection it should be noted that this case has been set down for trial in April 1961 so that a final judgment will be rendered in the near future.

sions and did not attempt to bring on the appeal itself until November 1960, despite the fact that depositions were being taken and the case was being actively prosecuted in the intervening months. As a general matter, if it ever appeared that attorneys who did possess the confidences of a former client were rash enough to use them either before or during the trial, prompt relief could certainly be secured from the District Court.

In view of the foregoing, it is submitted that in refusing to entertain the interlocutory appeals in *Fleischer* v. *Phillips* (a case in which this Court denied certiorari on the same issue raised by the instant petition), *Marco* v. *Dulles* and the case at bar, the Court of Appeals for the Second Circuit did not violate the principles of the *Cohen* case, and there is no reason to grant the writ.

3. The Court of Appeals did not violate 28 U. S. C. §1292(a)(1) because a motion seeking the disqualification of attorneys is not an application for an injunction.

In *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959), *cert. denied*, 359 U. S. 1002, the court rejected the argument that an order denying the disqualification of attorneys is automatically appealable under 28 U. S. C. §1292 (a)(1). In that case, there was also a formal separate motion to enjoin the attorneys. The court said at page 516.

> "The real and only bite to each motion is the attempt to secure the exclusion of the lawyers from the case; and once disqualification is obtained, all else is superfluous. Hence the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under 28 U. S. C. §1292(a)(1)." (Citing numerous authorities).

In the case at bar, petitioners did not even try to apply for a separate injunction. They simply sought an order "disqualifying and restraining the firm of Manning, Hollinger & Shea * * * from acting as attorneys for the plaintiff in the action, etc." (16) Petitioners' present argument that "the remedy demanded was analogous to that involved in proceedings to prevent a former employee entrusted with confidences from utilizing or disclosing the same in competing employment" (Petition p. 15), is patently fallacious. The only way to stop an ordinary former employee from using or disclosing confidences is by enjoining him, whereas an attorney, who is an officer of the court, and who is always subject to the disciplinary powers of the court, can be stopped from using or disclosing confidences by being disqualified. To repeat the Court of Appeals' position, "once disqualification is obtained, all else is superfluous." (264 F. 2d at 516).

4. The District Court was correct in finding that the matters in which respondents' attorneys had formerly represented The Maccabees are not related to the issues in this litigation.

The Petition contains a full-dress argument on the merits of the District Court's decision denying disqualification. It is submitted that such an argument is inappropriate in a petition for certiorari relating to the limited legal issue of whether an interlocutory order denying disqualification is appealable or not.

In any event, petitioners have sought to distort the District Court's findings by quoting only a portion of the lower court's opinion on page 18 of the Petition. The fact is that the District Court, which accepted as binding the legal tests for disqualification enunciated by Judge Weinfeld in *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*

113 F. Supp. 265 (S. D. N. Y. 1953), found not only that there was no *direct* evidence of confidential disclosures (see the portion of the opinion quoted on page 18 of the Petition), but also made an express finding that "the retainers of Manning, Hollinger & Shea by 'The Maccabees' were of a most limited and specific nature" and that the firm represented The Maccabees only in "matters totally unrelated to the instant case" (184 F. Supp. at 801), so that there could be no automatic *presumption* or "irrebuttable inference" that confidences had been disclosed.

Without going into a more detailed discussion of the merits at this time, it is submitted that the District Court's findings of fact were fully supported by the evidence before it (which included all of the relevant office files of Manning, Hollinger & Shea). It is also noted again that petitioners will have an opportunity to challenge the District Court's findings after there has been a final judgment in this case.

Conclusion.

For the reasons stated, this case presents no important questions which require the consideration of this Court and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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WILLIAM SCHUETMAN,
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February 6, 1961.